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J. Rodney Johnson, *Wills, Trusts and Estates*, 21 U. Rich. L. Rev. 855 (1987)

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WILLS, TRUSTS, AND ESTATES

*J. Rodney Johnson**

The 1987 session of the General Assembly enacted legislation dealing with wills, trusts and estates that amended fourteen sections and added three new sections to the Code of Virginia (the "Code"). In addition to this legislation, there were five cases from the Virginia Supreme Court during the past year that involved issues of interest to both the general practitioner and the specialist in wills, trusts, and estates. This article reviews all of these legislative and judicial developments. In order to facilitate the discussion of numerous Code sections, they will be referred to in the text by their section numbers only which, unless otherwise stated, will be understood as always referring to the latest printing of the old sections and to the 1987 supplement for the new sections.

I. LEGISLATION

A. *Adopted Persons Taking Under Wills or Trusts*¹

Prior to 1978, Virginia followed the "stranger to the adoption rule" in dealing with the rights of adopted persons to take under a will when they were not specifically named and the will failed to provide a constructional clause dealing with the matter. Under this rule a testator who used generic descriptive terminology such as heirs, issue, descendants, sisters, uncles, etc. to describe beneficiaries (other than the testator's own children) was presumed not to intend to include within such terms those persons who were members of the described class as a result of adoption. The rationale for this rule was that the testator, being a stranger to the adoption, presumably did not wish to be bound thereby.² In 1978, the General Assembly concluded that this rule was no longer representative of what the majority of Virginians would wish and accord-

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1. VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 1987).

2. This rule, and the background of § 64.1-71.1, is discussed in Johnson, *Inheritance Rights of Children in Virginia*, 12 U. RICH. L. REV. 275, 291-92 (1978).

ingly enacted section 64.1-71.1 to provide that "[i]n the interpretation of wills and trusts, adopted persons . . . are included in class gift terminology and terms of relationship in accordance with rules for determining relationships for purposes of intestate succession unless a contrary intent shall appear on the face of the will or trust."³ The reference to "rules for determining relationships for purposes of intestate succession" was a reference to section 64.1-5.1 which was enacted as a part of the same legislative measure that enacted section 64.1-71.1 in 1978.⁴ Section 64.1-5.1 provides that anytime a relationship of parent and child must be established⁵ for purposes of title 64.1, "[a]n adopted person is the child of an adopting parent"⁶ and thus gives the adopted person the same status in the adoptive family that would be enjoyed if the nexus had been a biological one. Thus, sections 64.1-5.1 and 64.1-71.1 were designed to operate together in order to give adopted persons the same intestate and testate succession rights throughout their adoptive families that they would have if they were biological members thereof.

However, in the recent case of *Hyman v. Glover*,⁷ the Virginia Supreme Court held in a 4-3 decision "that Code § 64.1-71.1 does not operate to include adopted children within the meaning of the word 'issue.' If the General Assembly intends for adopted children to be included in the word 'issue,' it must say so."⁸

The 1987 session of the General Assembly responded to the *Glover* decision by making a clarifying amendment to section 64.1-71.1 in order to expressly provide that "[i]n determining the intent of a testator or settlor, adopted persons are presumptively included in such terms as 'children,' 'issue,' 'kindred,' 'heirs,' 'relatives,' 'descendants' or similar words of classification"⁹ Although believing that this constructional rule would carry out the intent of the majority of Virginians, the General Assembly recog-

3. VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 1980).

4. 1978 Va. Acts, ch. 647.

5. It should be noted that all family relationships, other than husband and wife, are a function of establishing one or more parent-child relationships. For example, brothers are such only because they each have a parent-child relationship with the same mother and father.

6. VA. CODE ANN. § 64.1-5.1(1) (Repl. Vol. 1987).

7. 232 Va. 140, 348 S.E.2d 269 (1986). Although not originally associated with this case, the author became co-counsel for appellee in the petition for rehearing.

8. *Id.* at 147, 348 S.E.2d at 273; see also *infra* text accompanying notes 60-69.

9. VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 1987).

nized that some testators would wish to restrict succession to members of their biological family and, in order to also clarify the law in this area, the 1987 amendment to section 64.1-71.1 further provides that "[i]n determining the intent of a testator or settlor, adopted persons . . . are presumptively excluded by such terms as 'natural children,' 'issue of the body,' 'blood kindred,' 'heirs of the body,' 'blood relatives,' 'decendents of the body' [sic] or similar words of classification."¹⁰ It will be noted that the root words on this exclusive list are identical to the words on the positive list, but that each root word on the exclusive list is modified by additional language such as 'natural,' 'body' or 'blood,' which would rather clearly show an intent to exclude adopted persons. Accordingly, in interpreting wills and trusts that use generic descriptive terminology not specifically mentioned in the statute, it would appear that all such other terms would presumptively include adopted persons unless these terms are similarly modified by the use of additional language such as "natural," "body" or "blood."

A final clarifying amendment involved the replacement of the word "and" with the word "or" in the provision: "In the interpretation of wills and trusts, adopted persons . . . are included in class gift terminology *or* terms of relationship in accordance with rules for determining relationships for purposes of intestate succession unless a contrary intent shall appear on the face of the will or trust."¹¹ The conjunctive was replaced with the disjunctive in order to preclude any argument that the statute applied only to those gifts involving both a class gift and generic terminology.

B. *Illegitimate Persons Taking Under Wills or Trusts*¹²

Section 64.1-71.1, discussed in the preceding section in connection with the rights of adopted persons, has also provided since 1978 that "[i]n the interpretation of wills and trusts . . . persons born out of wedlock are included in class gift terminology and terms of relationship in accordance with the rules for determining relationships for purposes of intestate succession unless a contrary intent shall appear on the face of the will or trust."¹³ In an apparent response to the apprehension that a claim might be made by

10. *Id.*

11. *Id.* (emphasis added).

12. VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 1987).

13. *Id.* § 64.1-71.1 (Repl. Vol. 1980).

one alleging to be an illegitimate member of a class after a fiduciary has distributed an estate or trust, which might expose the distributing fiduciary to a personal liability, a "good-faith" amendment has been made to section 64.1-71.1 to protect such a fiduciary from any liability. This amendment provides that

"[i]n the event that a fiduciary makes payment to members of a class to the exclusion of persons born out of wedlock of whose claim of paternity or maternity the fiduciary has no knowledge, the fiduciary shall not be held liable to such persons for payments made prior to knowledge of such claim."¹⁴

The problem addressed by this amendment is not believed to be a significant one because of the reference in section 64.1-71.1 to "the rules for determining relationships for purposes of intestate succession." This is a reference to section 64.1-5.1 which provides, with one exception,¹⁵ that a person who has been adopted is no longer a child of its biological parents for purposes of title 64.1. Accordingly, as the typical illegitimate child will normally be adopted in early infancy, its relational link with its illegitimate parents will be severed and it will have no basis for a claim in their testate or intestate estates or in the estates of their family members.

C. *Adopted or Illegitimate Persons Taking Under Deeds*¹⁶

The General Assembly has also recognized that the interpretive problems regarding (i) adopted persons, as discussed in part A of this article, and (ii) illegitimate persons, as discussed in part B of this article, might arise in the case of grantors who were using deeds as will substitutes. Therefore, new section 55-49.1 was added by the 1987 session to provide the same rules for the interpretation of such deeds as section 64.1-71.1 provides for wills and trusts.

14. *Id.* § 64.1-71.1 (Repl. Vol. 1987).

15. *Id.* § 64.1-5.1(1) (Repl. Vol. 1987) provides that "[a]n adopted person is the child of an adopting parent and not of the biological parents, except that adoption of a child by the spouse of a biological parent has no effect on the relationship between the child and either biological parent"

16. VA. CODE ANN. § 55-49.1 (Supp. 1987).

D. *The Family Allowance*¹⁷

Section 64.1-151.1, the family allowance provision, was added to the Code in 1981 as a part of a comprehensive act designed to respond to the immediate economic needs of the surviving spouse and minor children of a deceased Virginia domiciliary. The purpose of the family allowance is to provide for the maintenance of the surviving spouse and minor children whom the decedent was obligated to support by awarding them a "reasonable allowance in money" from the decedent's estate during the probate period.¹⁸ A problem arose in this area of the law in 1986 when a circuit court ruled that a surviving spouse was not entitled to a family allowance unless the decedent was also survived by a minor child.¹⁹ This problem has been eliminated by the 1987 amendment to section 64.1-151.1 which provides that "[i]f there are no minor children, the allowance is payable to the surviving spouse."²⁰

E. *Payment of Small Accounts in Savings and Loan Associations*²¹

Section 6.1-194.58 is a probate avoidance statute that allows a savings and loan association to pay out the balance of a decedent's account to certain persons if (i) the account does not exceed \$5,000, (ii) sixty days have passed since the account owner's death, and (iii) there has been no qualification on the decedent's estate. Prior to July 1, 1986, the permissible payees under this statute were the decedent's spouse or, if none, the decedent's next of kin.²² Other statutes provide remedies for accounts in banks or trust companies,²³ and credit unions.²⁴

The 1986 session of the General Assembly intended to modify all of these statutes by striking the secondary provision, "to his or her

17. VA. CODE ANN. § 64.1-151.1 (Repl. Vol. 1987).

18. The family allowance is limited to one year if the decedent's estate is insolvent; otherwise it continues until the probate process is completed. The background of the family allowance will be found in Johnson, *Support of the Surviving Spouse and Minor Children in Virginia: Proposed Legislation v. Present Law*, 14 U. RICH. L. REV. 639 (1980). A further discussion of the family allowance section can be found in Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 522-23 (1982).

19. *In re Estate of Hess*, 8 Va. Cir. 256 (Roanoke 1986).

20. VA. CODE ANN. § 64.1-151.1 (Repl. Vol. 1987).

21. VA. CODE ANN. § 6.1-194.58 (Cum. Supp. 1987).

22. *Id.*

23. *Id.* § 6.1-71 (Cum. Supp. 1987).

24. *Id.* § 6.1-208.4 (Cum. Supp. 1987).

next of kin," and replacing it with "to the distributees of the decedent or other persons entitled thereto under the laws of this Commonwealth."²⁵ However, the 1986 legislation also inadvertently deleted the primary provision in favor of the decedent's "spouse" from the savings and loan section. The 1987 session corrects this error by restoring the spouse as the primary beneficiary in section 6.1-194.58.

F. *Payment of Small Trust or Estate Sums to Persons Entitled*²⁶

Section 64.1-123.3 was enacted by the 1985 session of the General Assembly to facilitate probate avoidance where an amount not exceeding \$5,000 is due a decedent from a trust fund. In such a case, if there has been no qualification on the decedent's estate within sixty days after death, this section provides that the trustee "may pay such sum to the distributees of the decedent or other person entitled thereto under the laws of this Commonwealth."²⁷ The 1987 amendment broadens the scope of this section by extending the same remedy, under the same conditions, to those cases where the sum is due to a decedent from the personal representative of another decedent's estate.

G. *Disbursements and Accountings in Small Estates*²⁸

Section 8.01-606, dealing with the payment of small amounts to certain persons through a court without the intervention of a fiduciary, and the parallel authority of commissioners of accounts, has been amended (i) to increase the ceiling applicable to circuit courts from \$4,000 to \$5,000 in all cases, (ii) to increase the ceiling applicable to commissioners of accounts from \$4,000 to \$5,000 when dealing with wills that authorize distributions to incompetents or infants without the intervention of a guardian or committee, and (iii) to authorize circuit courts to exempt fiduciaries from filing further accounts when the funds being administered do not exceed \$5,000.

25. See *id.*

26. VA. CODE ANN. § 64.1-123.3 (Repl. Vol. 1987).

27. *Id.*

28. VA. CODE ANN. § 8.01-606 (Cum. Supp. 1987).

H. *Waiver of Probate Fees and Requirements for Small Estates*²⁹

Section 26-12.3 formerly provided that when an estate does not exceed \$500, and an heir, beneficiary or creditor whose claim exceeds the value of the estate seeks to qualify as personal representative, the clerk shall waive (i) payment of tax³⁰ or court costs upon such qualification, (ii) inventory under section 26-12,³¹ and (iii) settlement under section 26-17.³² The 1987 amendment raises the ceiling in this section from \$500 to \$5,000.

I. *Commissioner's Authority—Fiduciary Bonds*³³

Section 26-2, which requires commissioners of accounts to examine and report on bonds and whether fiduciaries should be removed, has been amended to further provide that:

When any fiduciary of an estate has given a bond to the court and then absconds with or improperly disburses any or all of the assets of the estate, the commissioner may petition the court in which the order was made conferring his authority on the fiduciary, and ask the court to order that such bond be forfeited.³⁴

J. *Postmarital Contracts*³⁵

The 1985 session of the General Assembly enacted a Premarital Agreement Act (the "Act")³⁶ which, after its required reenactment by the 1986 session, (i) applies to all premarital agreements executed on or after July 1, 1986, and (ii) validates premarital agreements made prior to that time if they are otherwise valid as contracts.³⁷ The Act provides, inter alia, that spouses may contract with respect to (i) the disposition of property upon death, and

29. VA. CODE ANN. § 26-12.3 (Cum. Supp. 1987).

30. It is unclear how this provision for the clerk's waiver of "tax" is affected by VA. CODE ANN. § 58.1-1712 (Cum. Supp. 1987), which imposes a tax "on the probate of every will or grant of administration not exempt by law," and also provides that "the tax imposed by this section shall not apply to decedents' estates of \$500 or less in value." *Id.*

31. *Id.* § 26-12 (Repl. Vol. 1985).

32. *Id.* § 26-17 (Repl. Vol. 1985).

33. VA. CODE ANN. § 26-2 (Cum. Supp. 1987).

34. *Id.*

35. VA. CODE ANN. § 20-155 (Cum. Supp. 1987).

36. *Id.* §§ 20-147 to -154 (Cum. Supp. 1987).

37. A discussion of the Premarital Agreement Act is found in Swisher & Bucur, *Domestic Relations: Annual Survey of Virginia Law*, 19 U. RICH. L. REV. 731 (1985).

(ii) the making of a will, trust or other arrangement to carry out the provisions of the agreement.³⁸

The increasing publicity concerning the topic of premarital agreements has caused many persons who are already married to inquire about the possibility of will contracts, and other forms of postmarital agreements to settle their property rights upon death. Although the existence of the basic right to enter into postmarital agreements for such purposes has been clear,³⁹ the permissible scope of these agreements and the remedies in connection with their breach has not.

The 1987 session remedied this problem in a very straightforward manner by enacting section 20-155 to provide that married persons can contract with each other concerning their property rights (i) to the same extent, (ii) with the same effect, and (iii) subject to the same conditions as can persons who are engaged to be married. This approach of incorporating by reference the provisions of the Premarital Agreement Act, in addition to the obvious equitable argument, has the additional merits of statutory economy and ease of understanding on the part of the attorney and the consumer.

K. *Acts Barring Property Rights*⁴⁰

The 1981 session of the General Assembly enacted an expanded "anti-slayer's act" in order to more completely prevent a person who has wrongfully killed another from succeeding to the property of the victim or in any way benefiting from the wrongful killing.⁴¹ Unfortunately, this 1981 legislation perpetuated one of the problems of the predecessor statute because it narrowly defined the term "slayer" as a "person who is convicted of the murder of the decedent."⁴² Because of this narrow definition, there continued to be no statutory remedy⁴³ in those cases where the killer was

38. VA. CODE ANN. § 20-150 (Cum. Supp. 1987).

39. *Harlan v. Weatherly*, 183 Va. 49, 31 S.E.2d 263 (1944).

40. VA. CODE ANN. § 55-401 (Supp. 1987).

41. A discussion of this expanded "anti slayer's act" is found in Johnson, *Wills, Trusts, and Estates*, 68 VA. L. REV. 521, 525-28 (1982).

42. VA. CODE ANN. § 55-401 (Repl. Vol. 1986).

43. Notwithstanding the absence of a statutory remedy, the common-law remedy of constructive trust may still be available. Although decided under a prior statute, the case of *Sundin v. Klein*, 221 Va. 232, 269 S.E.2d 787 (1980), *cert. denied sub nom. Cross v. Sundin*, 452 U.S. 911 (1981), will be helpful in determining whether the Virginia Supreme Court will regard the statutory remedy in the new act as exclusive or merely cumulative with existing common law.

only charged with manslaughter or, though charged with murder, (i) died prior to being convicted, (ii) was convicted of a lesser included offense, (iii) was acquitted because, even though clearly guilty by a preponderance of the evidence, guilt could not be proven beyond a reasonable doubt, (iv) plea-bargained a guilty plea in return for a reduced charge, or (v) was acquitted on the grounds of temporary insanity.

The 1987 amendment to section 55-401 responds to some of these considerations by expanding the definition of "slayer" to also include any person "in the absence of such conviction and where such person has not been acquitted and is not available for prosecution by reason of his death by suicide or otherwise, who is determined by a court of appropriate jurisdiction by a preponderance of the evidence to have murdered the decedent."⁴⁴ The amendment further provides that one seeking to establish that a decedent was murdered by such a person will have the burden of proof on the issue.

L. *Springing Powers of Attorney*⁴⁵

As the statistical lifespan of the average American continues to increase, so also the incidence of mental incompetence can be expected to increase in the future. It is also being recognized that mental incompetence is not confined to the elderly as is often assumed. Like death, incompetence can come (i) at any age, (ii) due to illness or accidental injury, and (iii) without any prior warning. This increasing awareness on the part of both lawyer and consumer has led to an increased demand for powers of attorney to be used on a client's behalf if it becomes necessary. However, many lawyers have regularly drafted powers of attorney for their clients that were designed to become effective immediately upon delivery to the client's agent, instead of becoming effective "if and when" the client becomes incompetent. These lawyers have been reluctant to draw powers of attorney that were designed to come into legal existence at some time in the future when, by definition, the principal would be lacking in capacity to appoint an agent.

This legal uncertainty has been laid to rest by new section 11-9.4 which authorizes springing powers of attorney if the document in

44. VA. CODE ANN. § 55-401 (Supp. 1987).

45. VA. CODE ANN. § 11-9.4 (Cum. Supp. 1987).

question expressly provides that it will be effective only upon "(i) a specified future date, (ii) the occurrence of a specified future event or (iii) the existence of a specified condition which may occur in the future."⁴⁶ A further problem that has been presented by springing powers is convincing a third party that the condition attached to the power has actually occurred. Section 11-9.4 responds to this concern by further providing that "[i]n the absence of actual knowledge to the contrary, any person to whom such writing is presented shall be entitled to rely on an affidavit, executed by the attorney in fact or agent, setting forth that such event has occurred or condition exists."⁴⁷

Although this is good legislation, it still does not eliminate the concern of clients who do not wish a particular person to have a presently exercisable power. It would seem that such a client may really be saying that the person in question does not have the client's complete trust and confidence. If that is the case, it is submitted that the correct solution to the problem is not the use of a springing power but the selection of another person to serve as the client's agent.

M. *Provision for Burial of Ward or Ward's Spouse*⁴⁸

Section 37.1-142, dealing with the preservation, management, and gifts of a ward's estate by a court-appointed fiduciary, has been amended to provide that the fiduciary:

may transfer assets of a ward or a ward's estate into an irrevocable trust where such transfer has been designated solely for burial of the ward or spouse of the ward in accordance with conditions set forth in § 32.1-325(2)⁴⁹ and may also contractually bind a ward or a ward's

46. *Id.*

47. *Id.*

48. VA. CODE ANN. § 37.1-142 (Cum. Supp. 1987).

49. The Code requires the State Board of Medical Assistance Services to include in its state plan for medical assistance services pursuant to title XIX of the United States Social Security Act the following:

A provision for determining eligibility for benefits which disregards any transfer of assets into an irrevocable trust where such transfer has been designated solely for burial of the transferor or his spouse. The amount transferred into the irrevocable trust together with the face value of life insurance and any other irrevocable funeral arrangements shall not exceed \$2,000 prior to July 1, 1988, and shall not exceed \$2,500 after July 1, 1988.

VA. CODE ANN. § 32.1-325(A)(2) (Cum. Supp. 1987).

estate by executing a contract described in § 11-24⁵⁰ for the benefit of the ward.

N. *Marital Deduction—Constructional Rules*⁵¹

Prior to the Economic Recovery Tax Act of 1981 (ERTA),⁵² the maximum marital deduction allowed under federal estate tax law was limited to the larger of \$250,000 or one-half of the decedent's adjusted gross estate. As Congress knew that many pre-ERTA documents were drafted in formula language referring to the "maximum marital deduction," ERTA contained a transitional rule preventing its unlimited marital deduction provisions from applying to such documents unless they were amended after September 12, 1981 "to refer specifically to an unlimited marital deduction." Absent such an amendment, the transitional rule provided that these pre-ERTA documents would be deemed to refer to the pre-ERTA marital deduction unless governing state law was amended to provide a contrary result. The 1982 session of the General Assembly enacted section 64.1-62.1 as a parallel constructional rule, *mutatis mutandis*, to govern the rights of beneficiaries claiming under these same pre-ERTA documents.

In recognition of the fact that some drafters use formula language other than "maximum marital deduction," the 1987 amendment to section 64.1-62.1 provides an additional constructional rule for non-specifically-amended, pre-ERTA documents that contain a formula providing for "the maximum amount of property qualifying for the marital deduction allowable under federal law, but no more than will reduce such federal estate tax to zero or any other pecuniary or fractional share of property determined with reference to the marital deduction."⁵³ In such a case the amendment provides that the beneficiaries' rights will be determined as if the decedent had died and the computation in question had been calculated on December 31, 1981.

Lastly, section 64.1-62.1 was amended to provide that (i) its several constructional rules will not apply if the decedent had a con-

50. This Code section, entitled "Delivery of goods or merchandise; execution of contracts; money or other consideration to be held in trust; acknowledgment and recordation," deals with a variety of considerations relating to burial contracts. VA. CODE ANN. § 11-24 (Cum. Supp. 1987).

51. VA. CODE ANN. § 64.1-62.1 (Repl. Vol. 1987).

52. Pub. L. No. 97-34, 95 Stat. 172 (1981).

53. VA. CODE ANN. § 64.1-62.1(B) (Repl. Vol. 1987).

trary intent, (ii) that any proceeding to determine the existence of a contrary intent must be filed within twelve months following the decedent's death, and (iii) any such proceeding may be filed by the personal representative or any affected beneficiary under the will or other instrument.

O. *Virginia Estate Tax Lien*⁵⁴

Section 58.1-908 of the Virginia Estate Tax Act previously provided for a lien to arise automatically upon the Virginia property of a nonresident decedent having a taxable estate, while a lien on the Virginia property of a resident decedent having a taxable estate would arise only upon the filing of a memorandum in the appropriate clerk's office by the Department of Taxation. The 1987 amendment to section 58.1-908 ends the discriminatory treatment of nonresident decedents and provides that no lien will arise against any decedent's estate until the Department of Taxation has filed the required memorandum in the appropriate clerk's office.⁵⁵

P. *Declarations of Estimated Tax for Trusts and Estates*⁵⁶

Several amendments have been made to Code section 58.1-490. First, the fiduciary of every estate (except for taxable years ending less than two years after the decedent's death) and every trust must file a declaration of its estimated tax for every taxable year, if its Virginia taxable income can reasonably be expected to exceed \$400. Second, any overpayment of estimated taxes must be refunded to the fiduciary and cannot be taken as a credit by a beneficiary on the beneficiary's individual return. Third, any reference to an "individual" in the estimated tax provisions of the Code is deemed to include a fiduciary required to file a declaration for an estate or trust.⁵⁷ Section 58.1-493 has also been amended to provide that the required declaration of estimated tax is to be filed with the commissioner of revenue for the jurisdiction where the

54. VA. CODE ANN. § 58.1-908 (Cum. Supp. 1987).

55. The "appropriate office" for a lien on the personal estate of the decedent is the clerk's office of the county or city wherein the decedent resided, and for real estate it is the clerk's office of the county or city wherein such real estate is located. *Id.* § 58.1-908(A)(2).

56. VA. CODE ANN. §§ 58.1-490, -493 (Cum. Supp. 1987). The reader will note that § 58.1-490 is set out twice, and reference in this article is made to the second version, effective for taxable years beginning on and after January 1, 1988.

57. *Id.* § 58.1-490.

fiduciary qualified or, if there is no Virginia qualification, in the city or county where the fiduciary resides, does business or has an office, or where any of the beneficiaries reside. All of these amendments are effective for taxable years beginning on or after January 1, 1988.⁵⁸

Q. *Generation Skipping Tax*⁵⁹

Section 58.1-936 imposes a pick-up tax on certain generation-skipping transfers that is keyed into the federal credit allowable for state taxes on generation-skipping transfers. The 1987 amendments to section 58.1-936 are for conformance purposes following the passage of the Tax Reform Act of 1986, to change the reference to the federal statute from Internal Revenue Code section 2602 to Internal Revenue Code section 2604, and to state the section's applicability to transfers occurring after October 22, 1986.

II. JUDICIAL DECISIONS

A. *Adopted Persons Taking Under Wills*

In *Hyman v. Glover*,⁶⁰ the relevant portion of the testatrix' will gave a share of her estate to each of her children "and one share to the issue of each deceased child of mine, such issue to take, collectively, per stirpes, the share of their deceased ancestor."⁶¹ The trial court held that, under section 64.1-71.1,⁶² "[t]he word 'issue,' standing alone, now includes persons who qualify by or through adoption."⁶³ Accordingly, the trial court granted an adopted granddaughter's motion for summary judgment that she was entitled to the one-fifth share of her deceased father in the testatrix' estate. The Virginia Supreme Court's 4-3 decision reversing the trial court concluded "that Code § 64.1-71.1 does not operate to include adopted children within the meaning of the word 'issue.' If the General Assembly intends for adopted children to be included in the word 'issue,' it must say so."⁶⁴ In response to this decision, the

58. *Id.* § 58.1-493.

59. VA. CODE ANN. § 58.1-936 (Cum. Supp. 1987).

60. 232 Va. 140, 348 S.E.2d 269 (1986). Although not originally associated with this case, the author became co-counsel for appellee in the petition for rehearing.

61. *Id.* at 141, 348 S.E.2d at 270.

62. The relevant language of this section, as it existed at testatrix' death, is reproduced in the text following note 2, *supra*.

63. *Glover*, 232 Va. at 142, 348 S.E.2d at 270.

64. *Id.* at 147, 348 S.E.2d at 273.

1987 session of the General Assembly enacted a clarifying amendment to section 64.1-71.1 which reads as follows:

In determining the intent of a testator or settlor, adopted persons are presumptively included in such terms as "children," "issue," "kindred," "heirs," "relatives," "descendants" or similar words of classification and are presumptively excluded by such terms as "natural children," "issue of the body," "blood kindred," "heirs of the body," "blood relatives," "decendents of the body" [sic] or similar words of classification.⁶⁵

Although this 1987 legislation addresses the primary issue raised by the *Glover* decision, eliminating the need for extended discussion of the case, there is one point that needs to be noted because of its possible impact on the construction of statutes dealing with adopted persons in the future. In one part of its opinion, the majority states that "[g]iven the common law meaning of the word 'issue,' any statute enacted to change that meaning would necessarily be in derogation of the common law . . . [and] 'statutes in derogation of the common law are to be strictly construed'"⁶⁶ This language should be contrasted with the Court's language in *Fletcher v. Flanary*,⁶⁷ stating:

The right to adopt children was unknown to the common law and is probably inherited from the civil law of Rome. Since it is not in derogation of the common law, the strict construction of statutes which hinge upon that system are not to be applied. With us the entire field of adoption is covered by statute.

Since these statutes confer a beneficial interest they are to be liberally construed, particularly in a contest between the adopted son and the estate of his intestate foster parents, to a less extent when the contest is between the adopted son and the estate of some remote ancestor by adoption.⁶⁸

Although the *Fletcher* case was cited in the *Glover* majority opinion,⁶⁹ it was cited on another issue, and the majority opinion ap-

65. VA. CODE ANN. § 64.1-71.1 (Repl. Vol. 1987). A complete discussion of this clarifying amendment is found *supra* part A at notes 1-11.

66. *Glover*, 232 Va. at 143, 348 S.E.2d at 271 (citations omitted).

67. 185 Va. 409, 38 S.E.2d 433 (1946).

68. *Id.* at 411-12, 38 S.E.2d at 434.

69. 232 Va. at 143, 348 S.E.2d at 271 (citing *Fletcher*, 185 Va. at 415, 38 S.E.2d at 435).

pears to be unaware of this aspect of the prior decision in the *Fletcher* case.

B. Construction of "Nearest Living Paternal Kindred"

In *Elmore v. Virginia National Bank*,⁷⁰ the relevant portion of the settlor's trust agreement identified her ultimate takers as "the nearest living paternal kindred of the Grantor."⁷¹ The grantor was survived by two paternal first cousins. Three other paternal first cousins predeceased the grantor but were survived by issue who claimed that they were entitled to their deceased parent's share. Although the issue would have been so entitled under intestate succession principles, the Supreme Court of Virginia concluded that "'kindred' is not a highly technical term whose primary meaning is determined by reference to the statute of descent and distribution. It is similar to the phrase 'next of kin,' which we have held is a nontechnical term whose commonly accepted meaning is 'nearest in blood.'"⁷²

The court's construction in the instant case was further reinforced by the fact that the trust instrument contained a reference to the statute of descent and distribution in another provision that preceded the provision in question by only two sentences. The court concluded that this reference "demonstrates that the drafter of the instrument understood the import of the chosen language and intended to accomplish a different result."⁷³ Accordingly, the court affirmed the trial court's holding that the term "nearest living paternal kindred" was clear and unambiguous, and that the two surviving first cousins were the sole takers thereunder.

C. Surviving Spouse as "Heir at Law"

In *Carter v. King*,⁷⁴ the relevant language of a testamentary trust, created in 1920, provided for a life estate in one person "with remainder to her heirs at law, to be determined as of the date of her death."⁷⁵ Upon the life tenant's death in 1982, she was sur-

70. 232 Va. 310, 350 S.E.2d 603 (1986). The author served as co-counsel for appellants in this case.

71. *Id.* at 312, 350 S.E.2d at 605.

72. *Id.* at 314, 350 S.E.2d at 606.

73. *Id.* at 315, 350 S.E.2d at 607.

74. 233 Va. 60, 353 S.E.2d 738 (1987).

75. *Id.* at 61, 353 S.E.2d at 739.

vived by her second husband and by two children of her first marriage. The issue before the court was the correctness of the trial court's holding that decedent's surviving husband was not an "heir at law" of decedent within the meaning of section 64.1-1.⁷⁶ On July 1, 1982, twenty-five days before decedent's death, newly-amended section 64.1-1 became effective and identified the first category of heirs as follows:

First. To the surviving spouse of the intestate, unless the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse, in which case such estate shall pass to the intestate's children and their descendants subject to the provisions of § 64.1-19.⁷⁷

This statutory language clearly identifies a decedent's surviving spouse as the sole heir (i) if the decedent leaves no surviving descendants, or (ii) if all of the decedent's surviving descendants are also descendants of the decedent's surviving spouse. However, the court held that "a surviving spouse is *not* an heir of the decedent when, as here, 'the intestate is survived by children or their descendants, one or more of whom are not children or their descendants of the surviving spouse.'"⁷⁸ In such a case the intestate's heirs are the intestate's children or their descendants, to whom the decedent's realty descends subject to the surviving spouse's dower or curtesy rights under section 64.1-19. Although dower and curtesy rights were increased from a life estate in one-third to a fee simple estate in one-third in 1977, the court saw the increase as relating only to that interest's dimensions, as opposed to its character, and thus "reject[ed] the suggestion that the General Assembly intended the amendment to convert dower or curtesy, a marital right, into a right of inheritance."⁷⁹

76. "The parties agree that . . . the question whether a surviving spouse is an heir at law in this Commonwealth is governed by the provisions of Code § 64.1-1 and related statutes in effect on the date of the decedent's death." *Carter*, 233 Va. at 61, 353 S.E.2d at 739.

77. This section of the Code provides that:

A surviving spouse shall be entitled to a dower or curtesy interest in fee simple of one third of all the real estate whereof the deceased spouse or any other to his use was at any time seized during coverture of an estate of inheritance, unless such right shall have been lawfully barred or relinquished.

VA. CODE ANN. § 64.1-19 (Repl. Vol. 1987).

78. *Carter*, 233 Va. at 63, 353 S.E.2d at 740.

79. *Id.*

D. *Contract Execution Prevents Later Disclaimer*

In *Niklason v. Ramsey*,⁸⁰ the decedent's will was challenged on the grounds of lack of testamentary capacity. The parties to the suit, including the decedent's son, entered into an agreement to invalidate the will and divide the estate. The decedent's son then purported to disclaim his interest in his mother's estate.

Two of the son's judgment creditors challenged the disclaimer as invalid under Code section 64.1-194 which provides that "[a]ny . . . assignment, conveyance, encumbrance, pledge or transfer of property or interest therein or contract therefor . . . bars the right to disclaim as to the property or interest."⁸¹ In affirming the trial court's decision finding the disclaimer ineffective, the Virginia Supreme Court said that "by contracting away whatever interest [the son] may have had in his mother's estate, [he] exercised dominion over her estate contrary to the language of Code § 64.1-194."⁸²

E. *Joint Account Funds Used to Purchase Treasury Bills*

In *Bennet v. First & Merchants National Bank*,⁸³ the Virginia Supreme Court considered whether the ownership of a United States Treasury Bill purchased with joint account funds is determined by section 6.1-125.5.⁸⁴

In *Bennet*, a father (Butler) and daughter (Mindy) opened a survivorship joint bank account, funded by Butler's money. At Butler's request, Mindy took the passbook to the bank and purchased a six-month \$100,000 Treasury Bill. The "Security Buy Memo" listed Butler as "customer," and Mindy as "co-owner." The internal bank records listed the purchase as "for the account of Taylor Scott Butler." Butler died before the Treasury Bill matured. After Butler's death, the bank corrected its records to show the purchase "as agent" for "Taylor Scott Butler or Mindy Thompson." The

80. 233 Va. 161, 353 S.E.2d 783 (1987).

81. VA. CODE ANN. § 64.1-194 (Repl. Vol. 1987).

82. *Niklason*, 233 Va. at 164, 353 S.E.2d at 784.

83. 233 Va. 355, 355 S.E.2d 888 (1987).

84. The Code provides, insofar as relevant to this, that "[s]ums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intention at the time the account is created." VA. CODE ANN. § 6.1-125.5(A) (Repl. Vol. 1983). The background to this legislation will be found in Johnson, *Joint Totten Trust, and P.O.D. Bank Accounts: Virginia Law Compared to the Uniform Probate Code*, 8 U. RICH. L. REV. 41 (1973).

bank's practice was to debit its customer's account upon the purchase of Treasury Bills.⁸⁵

The Virginia Supreme Court first noted that Code section 6.1-125.5(A), dealing with survivorship in joint accounts, was not applicable to the case because the relationship between the depositor (Butler) and the United States government was not an "account" as that term is defined in the Code.⁸⁶ The Code's definition of "account" required a debtor-creditor relationship between a depositor and the financial institution. The court concluded that the only debtor-creditor relationship with respect to the Treasury Bill was between the bank and the government.⁸⁷

Furthermore, the court noted that section 55-20⁸⁸ abolishes the common-law right of survivorship between joint tenants except "when it manifestly appears from the tenor of the instrument that it was intended the part of the one dying should then belong to the others."⁸⁹ There was no evidence in the case applicable to this exception.

The court also considered Butler's ownership of the bank account prior to and at the time the funds were withdrawn. It was clear to the court that pursuant to section 6.1-125.3(A),⁹⁰ the funds belonged solely to Butler. The court said that it was established Virginia law that "[a]ny asset purchased with his funds at his direction is presumed to be his sole property in the absence of evidence that it was intended to be the subject of a gift, or unless he made a different disposition by contract."⁹¹ The presumption was not rebutted. Thus, the court reversed the trial court's decision that the Treasury Bill was excluded from Butler's estate by virtue of survivorship.⁹²

85. *Bennet*, 233 Va. 355, 355 S.E.2d 888.

86. 233 Va. at 360, 355 S.E.2d at 890-91. For purposes of multiple party accounts, § 6.1-125.1(1) defines an "account" as "a contract of deposit of funds between a depositor and a financial institution, and includes a checking account, savings account, certificate of deposit, share account, and other like arrangement." VA. CODE ANN. § 6.1-125.1(1) (Repl. Vol. 1983); see also *id.* §§ 6.1-125.1 to 125.16.

87. *Bennet*, 233 Va. at 360, 355 S.E.2d at 891.

88. VA. CODE ANN. § 55-20 (Repl. Vol. 1986).

89. *Bennet*, 233 Va. at 360, 355 S.E.2d at 891 (quoting VA. CODE ANN. § 55-21 (Repl. Vol. 1986)).

90. The Code provides, insofar as relevant to these facts, that "[a] joint account belongs, during the lifetimes of all parties, to the parties in proportion to the net contributions by each to the sums on deposit" VA. CODE ANN. § 6.1-125.3(A) (Cum. Supp. 1987).

91. *Bennet*, 233 Va. at 361, 355 S.E.2d at 891.

92. *Id.*